



**STATE OF NEW JERSEY**

**Board of Public Utilities**

**Two Gateway Center**

**Newark, NJ 07102**

**[www.bpu.state.nj.us](http://www.bpu.state.nj.us)**

**TELECOMMUNICATIONS**

IN THE MATTER OF THE JOINT  
PETITION OF SBC COMMUNICATIONS INC.  
AND AT&T CORP, TOGETHER WITH )  
ITS CERTIFICATED SUBSIDIARIES FOR )  
APPROVAL OF MERGER )

**PROVISIONAL ORDER**

**BPU DOCKET NO. TM05020168**

**(SERVICE LIST ATTACHED)**

**BEFORE COMMISSIONER FREDERICK F. BUTLER:**

The New Jersey Board of Public Utilities ("Board"), pursuant to N.J.S.A. 48:2-1 et seq., has been granted general supervision and regulation of and jurisdiction and control over all public utility systems which operate within the State of New Jersey, including telephone companies such as AT&T Communications NJ, L.P. ("AT&T"). Moreover, the Board has specifically been granted the authority to review certain mergers and acquisitions by and of such public utilities, pursuant to N.J.S.A. 48:2-51.1 and N.J.S.A. 48:3-10. Pursuant to said authority, the within matter was initially opened to the Board upon the joint filing of a request by AT&T, together with its certified subsidiaries, and SBC Communications Inc. ("SBC", jointly "petitioners") for Board approval of their proposed merger. In connection with this matter the Board conducted hearings on June 14 and 15, 2005, in which six witnesses for petitioners were cross examined and numerous documents were marked for identification and offered into evidence as part of the record of this proceeding.

At the close of the aforementioned hearings, counsel for the Division of the Ratepayer Advocate offered ten binders of documents into evidence. RPA counsel stated that all the documents had been provided by petitioners in discovery and all were relevant to the issues in dispute. Counsel further stated that some, though not all of the disputed documents had been referenced by petitioners' witnesses under cross examination, and that all subject matter areas covered in said documents had been discussed by

petitioner's witnesses. Board Staff asserted that the documents in question should be admitted in order to ensure the creation of a full and complete record.

Petitioners objected to the RPA's submission, stating that the documents not specifically referred to and authenticated by petitioners' witnesses are inadmissible. Petitioners acknowledged that they had provided the disputed documents in discovery as part of a very large data request by the RPA. However, petitioners stated that this had not served as fair notice of which documents the RPA would attempt to introduce at the hearing, since, at the RPA's request, petitioners had not reviewed the documents as they were being copied and bound. Petitioners further argued admission of the RPA's documents without proper authentication would amount to a deprivation of fundamental fairness and due process, because petitioners would not have an adequate opportunity to contest, explain or challenge the documents.

This Presiding Officer initially questioned the admissibility of any document for which no foundation had been laid via cross-examination. However, following lengthy oral argument at the end of the hearings, the Presiding Officer ordered the parties to review the individual documents in dispute. Petitioners were further ordered to submit, following their review, any written objections to whatever documents in the ten binders or any other document they still deemed to be inadmissible in this proceeding. The RPA was also afforded the opportunity to respond, and a decision as to the admissibility of each document would then be made.

Petitioners filed their written objections on June 21, 2005. In support thereof petitioners offered a detailed procedural history of this matter, outlining in a sworn affidavit how they and counsel for the RPA had agreed to handle a voluminous quantity of documents which petitioners had previously submitted to the FCC under a highly restrictive federal protective order which prohibits the RPA from copying any protected document. According to petitioners, the RPA agreed to abide by the FCC protective order in this state proceeding and further requested that certain documents be placed in binders for the RPA's use at hearing. According to petitioners' affidavit, the RPA requested that petitioners not view the documents it had selected for use at hearing, in order to preserve RPA's trial strategy. Petitioners honored this request, despite their desire to confer with the RPA before the hearing regarding possible admissibility stipulations. As a result, petitioners were not on notice regarding what particular documents from the large amount submitted to the FCC the RPA intended to use at hearing.

Petitioners still contend that no document should be admitted into the official record of this administrative proceeding that was not used in the cross-examination of a live witness at hearing or stipulated to. Petitioners argue that their admission would violate both due process and fundamental fairness. Without such foundation being laid, according to petitioners, the trustworthiness of evidence cannot be adequately tested, explained or rebutted. Petitioners further define a proper foundation as the establishment of "the document's authenticity and its relevance," along with the opportunity to respond to the submission. Joint Petitioners Opposition ("JPO") at 13. Therefore, petitioners object to any document in the 10 binders for which the RPA failed to lay a "proper witness foundation" by means of cross examination.

In further support of this position, petitioners state that allowing such documents to be admitted would be bad public policy, because "any ruling that any discovery response to be per se admissible, no matter what its content or relevance, would have disastrous results for the conduct of proceedings before the Board or other agencies." Id. Petitioners argue that such action would have the affect of freezing the heretofore free flow of discovery in such proceedings. Petitioners note that many of their discovery responses have been provided subject to objections as to relevance and admissibility.

As set forth in lengthy appendices to their brief, petitioners stipulate to the admission of numerous documents offered into evidence by the RPA or excerpts thereof, for which, according to petitioners, a proper foundation was laid by the RPA via cross examination of one or more petitioner witnesses.

In response to petitioners' objections, the RPA maintains its position that all documents in the 10 binders are relevant and admissible, and that the rules of evidence do not apply in administrative proceedings. The RPA contends that the Board has the discretion to include any document it deems relevant and that will lead to a full and complete record. Notwithstanding the foregoing, the RPA has withdrawn its request that all the documents and discovery responses be admitted into evidence, and has submitted a paired-down list of twelve documents for admission into the record. These fall into three categories: 1) in those cases where petitioners stipulated to incomplete documents, the RPA seeks admission of the entire document; 2) the RPA seeks admission of additional documents, not stipulated to by petitioners, pertaining to a subject area allegedly discussed by SBC witness James Kahan; and 3) the RPA seeks admission of two other documents allegedly relied on by two other SBC witnesses Drs. Carlton and Sider, in preparation of their initial testimony. With the admission of these documents and, apparently, the 22 documents stipulated to by petitioners as per Attachment 2 to their June 21 Objections, the RPA asserts that the record is sufficient to allow the Board to render a well-informed decision, and that the extra briefing time previously requested is not necessary.

In reply to the aforementioned filing, petitioners reiterate their previous argument that only documents which were authenticated by an SBC or AT&T witness through cross-examination, or were stipulated to, are admissible. Petitioners further argue that authentication of a complete document does not automatically follow from authentication or stipulation of part of it. Notwithstanding this position, petitioners voluntarily stipulate to the admission of two exhibits on the paired down RPA list (Binder 6, 449328-449367 and Binder 9, 422588-422600).

With respect to seven other documents which the RPA alleges pertain to a subject area discussed by SBC witness Kahan, petitioners contend that these documents were not presented to any witness at the hearings. According to petitioners, three of these seven were related to a different presentation than that addressed by Mr. Kahan. The other four exhibits in this category do not, according to petitioners, refer to the subject of Mr. Kahan's testimony (with one exception) and were produced by third parties.

Petitioners also reiterate their objections to the three documents in "Category 3"<sup>1</sup> which "are particularly objectionable because they are SBC company documents and the RPA did not establish a foundation with company witnesses for their admissibility (Petitioners' Letter Brief at 12). Petitioners further state that Witnesses Carlton and Sider did not, contrary to the RPA's filing, lay any foundation for the entry of these documents into evidence.

Staff also submitted a written position in response to the RPA's amended evidence submissions. Staff agrees with the RPA that the Presiding Officer is not bound by formal rules of evidence in this proceeding. Staff disagrees with petitioners that no document for which a formal foundation has not been laid through cross examination can be admitted into evidence, since the keystone considerations are fairness, justice and the ascertainment of truth. Staff points out that such a broad interpretation is inconsistent with Staff's special role as a developer of the record, which does not require it to prefile testimony or put on a witness for cross examination. See New Jersey Department of the Public Advocate v. New Jersey Board of Public Utilities, 189 N.J. Super. 491, 518-19 (App. Div. 1983). Staff contends that a full and complete record allows the Board to make an informed final decision in this important matter. Based on the RPA's revised position, Staff reiterates that the documents offered into evidence by the RPA are admissible. Staff also reiterates its original request that two exhibits, petitioners' full responses to data requests RPA-104 and Staff-3 be admitted, based on the fact that both documents were provided by petitioners and contain relevant information that is necessary for a full and complete record in this matter.

## DISCUSSION

In contested cases before an administrative form, evidence rulings shall be made to promote fundamental principles of fairness and justice, and to aid in the ascertainment of truth. N.J.A.C. 1:1-15.1(b). Parties in such cases are generally not bound by statutory or common law rules of evidence, or any rule set forth in the New Jersey Rules of Evidence. N.J.A.C. 1:1-15.1(c). Except as enumerated in certain exceptions in the Administrative Code, all relevant evidence is admissible. Id. A judge may, in his or her discretion, exclude any evidence if its probative value is substantially outweighed by the risk that its admission will either necessitate undue consumption of time or create substantial danger of undue prejudice or confusion. Id. Any writing document offered into evidence which has been disclosed to each party at least five days before the hearing shall be presumed authentic. N.J.A.C. 1:1-15.6. At the hearing any party may raise questions of authenticity. Id. Where a genuine question of authenticity is raised the judge may require some authentication of the questioned document. For these purposes the judge may accept a submission of proof, in the form of an affidavit, certified document or other similar proof, no later than 10 days after the date of the hearing. Id.

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<sup>1</sup> Two separate documents (Binder 5, No. 228136-228183 and Binder 5, No. 228948-228962) are listed as one exhibit by the RPA.

The Board may take notice of facts that are judicially noticeable under New Jersey Rule of Evidence 201. N.J.A.C. 1:1-15.2(a). Admissible sources have included a wide array of periodicals, treatises, empirical studies and analyses. See e.g., Martin v. Nager, 192 N.J. Super. 189, 193-194 n.1 (Ch. Div. 1983); State v. Dohme, 229 N.J. Super. 49, 55 n.3 (App. Div. 1988); Pomanowski v. Monmouth Cty. Bd. of Realtors, 175 N.J. Super. 212, 220 (Ch. Div. 1980), rev'd on other grds 89 N.J. 306, cert. den. 459 U.S. 908 (1982). Brambley v. McGrath, 347 N.J. Super. 1, 7 (App. Div. 2002).

The absolutist position taken by petitioners in this matter, that this Presiding Officer must enforce a *per se* prohibition on the admission of any documentary evidence that has not been authenticated by a live witness, does not comport with the controlling standard for the admission of evidence in an administrative proceeding. Nor was such a prohibition imposed at the hearing once the positions of the parties were fully aired. (2&235-7 to 25; 2T262-15 to 2T263-7) As all parties rightly point out, the rules of evidence that govern the admissibility of documents in a Superior Court proceeding do not apply here. This relaxation of formal requirements is consistent with the well established principle that administrative hearings are not formal trials, and that informal procedures may be employed to the extent that they do not destroy fundamental fairness. See Rosa v. Bowen, 677 F.Supp. 782, 785 (D.N.J. 1988). In order to function effectively, administrative tribunals enjoy broad powers to adjust their procedures in furtherance of their proper objectives. In re Shelton College, 109 N.J. Super. 488, 492-493 (App. Div. 1970) (Board of Higher Education could conduct hearing without quorum by taking fair and realistic step of ensuring all absent members received transcript and exhibits). The rules governing Office of Administrative Law Practice underscore this flexibility. See, e.g., N.J.A.C. 1:1-15.5 (hearsay; residuum rule); N.J.A.C. 1:1-15.6 (authentication and contents of writings).

Evidence rulings must promote fundamental principles of fairness and justice and aid in the ascertainment of truth. N.J.A.C. 1:1-1:1-15.1(b). In accordance with these principles, the Administrative Code contains a presumption of authenticity that applies to written documents for which adequate notice has been given. N.J.A.C. 1:1-15.6. By contrast, nowhere does the N.J.A.C. require, *per se*, that a formal testimonial foundation be laid for every document offered into evidence in order to ensure due process and fundamental fairness. Thus, while fundamental fairness requires that a party must be able to contest and otherwise rebut the evidence offered against it, nowhere is it stated that this right must be effectuated via cross examination only, no matter what the circumstances. Moreover, no case cited by plaintiffs holds otherwise. See In re Plainfield-Union Water Co., 11 N.J. 382, 388-389 (1953) (administrative determination could not be made based in part on report that was kept secret from parties until after decision was rendered and appealed); Susquehanna, etc., A'ssn v. Bd. of Pub. Util. Comm'rs, 55 N.J. Super. 377, 407-409 (App. Div. 1953) (Board could not base decision on undisclosed evidence or evidence outside the record); Sander v. Planning Bd. of Tp. of Warren, 140 N.J. Super. 386, 394 (App. Div. 1976) (individual landowner could not meet consultant's report effectively without cross-examining author when report was sole basis of recommendation to board of adjustment by planning board, issued without prior warning, that application for use variance be denied).

It follows that the critical determination with respect to the admissibility of evidence in this or any administrative proceeding before the Board is not whether specific procedural requirements for admission have been met, but whether individual documents have been shown to be authentic and reliable, based on the totality of circumstances. Moreover, the instant issue is not whether the Board should consider secret evidence outside the record, as it was in the aforementioned judicial opinions. Rather, it is whether the RPA's evidence is authentic and reliable enough to be included in that record, which remains open at this time. In order to answer that question the Presiding Officer must review the individual documents offered by the RPA into evidence to determine whether, under the totality of circumstances, each is authentic, reliable and relevant enough to be admitted, and whether the parties have been afforded adequate opportunity, through cross-examination, written argument or otherwise, to rebut that foundation. Thus, petitioners' contention that the admission into evidence of *any* document produced in discovery is bad policy is accurate, but misses the point. At no time has the RPA advocated such a position in this proceeding, nor would the Board countenance such a policy.

In this regard it should be noted that all the disputed documents originated from petitioners, who themselves placed them in binders for the RPA's use, and that all of these documents have been provided to the FCC in discovery. Moreover, petitioners have placed restrictions on access to those documents that are unprecedented in Board proceedings of this type. Nonetheless, it also appears that the RPA's refusal to fully specify the documents it intended to use at the hearings to petitioners until at least the commencement of those hearings, to the point of extracting a pledge from petitioners to not view the documents as they compiled them, has created confusion and delay.

Nonetheless, I agree with the RPA that no basis exists in due process or fundamental fairness for withholding from this administrative record documents in their entirety when petitioners' witnesses have authenticated and testified as to portions of them. Such an interpretation of foundational requirements would presumably require an admitting party to separately authenticate every discrete segment of a document. Furthermore, complete documents are generally necessary to provide the Board with a full contextual picture of the evidence presented. I note that despite their position to the contrary, petitioners have voluntarily stipulated to the admission of the two documents which the RPA allege are complete examples of documents that were partially stipulated to by petitioners previously (Binder 6, Nos. 449328-449367 and Binder 9, No. 422588-422600).

Of the remaining ten documents at issue, a sufficient foundation for the admission of eight of them has been laid by the RPA. All ten documents originated from petitioners. Witness James Kahan testified that he was closely connected with the SBC undertaking known as "Project Olympus," which was apparently a compilation of data regarding the proposed merger that was presented to the SBC Board of Directors. Mr. Kahan testified in considerable detail with respect thereto (e.g. 1T192 to 1T197). Four of the contested documents are entitled "Project Olympus" and three of those are marked on their cover pages as having been authored by "James S. Kahan." Given the foregoing, I find that these four documents (Binder 6, Nos. 452843-452845, 452910-452912, 452977-

453016, 452138-452180) are sufficiently authentic and reliable to be admissible, even though Mr. Kahan did not specifically reference them in his testimony. They are also relevant to this matter, as they purport to analyze projected merger synergies and savings. They are therefore admitted into evidence.

Similarly, a sufficient foundation exists for two other documents sought to be admitted by the RPA: Binder 9, Nos. 423855-423876 and 423917-423929. Both were supplied by petitioners and both clearly state that they are Corporate Models compiled by Deutsche Bank Securities that depict the projected earnings, cash flow, balance sheets and other financial data of SBC and AT&T. Both state that the data they contain is made up of company information and estimates. Mr. Kahan, while not referencing the documents themselves during cross examination, testified in his direct prefiled testimony about the financial state of SBC should the merger not be approved, as well as the effect on SBC's ability to compete as a combined entity with AT&T. (Kahan Direct at 13, 17-19). Similarly, Witness Hossein Eslambolchi discussed the alleged benefits of the merger for the combined entity over AT&T's stand-alone prospects. (Eslambolchi Direct at 5-10). The current and future financial state of petitioners is relevant to whether, as they contend, the state of competition in New Jersey will be improved if they are allowed to merge. Thus, the RPA has laid a sufficient foundation for these two documents, they are relevant, and hereby admitted.

I also find that the document entitled "Marketing Plan 2005-2007" should be admitted into evidence (Binder 9, No. 420875-420988). The RPA introduced this document, which was provided by SBC in discovery and purports to present a high level analysis of SBC marketing strategies going forward, while cross examining Mr. Kahan. He denied any knowledge of it, but proceeded nonetheless to comment extensively on its contents (2T224-20 to 2T227-2). He also testified at length as to SBC's future marketing goals (2T78 to 2T81). Given, this testimony, there is more than adequate support in the record to conclude that this document is what it purports to be. It is also directly relevant to one of the factors this Board is required consider in its review of the merger: the affect it will have on the state of competition in the New Jersey telecommunications market. Therefore, this document should be and is hereby admitted into evidence.

Similarly, a sufficient foundation exists to admit the document entitled "Local Telephone Service Lost Customer Studies," involving SBC customer interviews and competitive line loss (Binder 5, No. 228136-228183). This document was provided by petitioners and purports to be generated by SBC. It further states that it was generated by "SBC Customer Analytics and Research" in March, 2004. Its relevance to this proceeding is clear, since it deals with the reasons for SBC's wireline loss. A significant portion of Dr Carlton's and Dr. Sider's joint initial testimony is devoted to the issue of line loss throughout the country, caused in part, according to the witnesses, by dramatic changes in technology (Carlton/Sider Direct at 11-19). They point to this development as one of the reasons that the proposed merger will not harm consumers in New Jersey (Id. at 3). Balancing these factors, I find that this document is sufficiently authentic, reliable and relevant to be admissible, and is hereby admitted.

In contrast, the document entitled “Non-Competitive Loss *Current Overview*” (Binder 5, No. 228948-228962) is not admissible. No witness referred to it during the hearings, and nowhere is there any indication of the document’s origin from within SBC or AT&T or the source of the data contained therein. In these circumstances there are insufficient indicia of reliability to permit the document to be admitted, and it is hereby excluded from the record.

I also find that an insufficient foundation exists in the record to ensure the reliability and authenticity of the document entitled “Thunder Debt Analysis” (Binder 6, No. 452185-452198). This document was produced in discovery by petitioners. However, it was not referred to by any witness and contains no overt reference to SBC, AT&T, their proposed merger or Project Olympus, and is devoid of any other indication that it pertains to the subject matter of this proceeding. Under these circumstances, there is no basis for concluding that the document is an authentic and reliable source of relevant information. It is therefore excluded.

To the extent that RPA-104 and S-3, petitioners’ responses to data requests from the RPA and Staff, respectively, have not already been stipulated to, I find that a sufficient foundation has been laid for their admission and they are relevant to this proceeding. These two exhibits are hereby admitted into evidence.

To the extent petitioners wish to rebut or challenge the reliability of any part of these exhibits, they are free to do so in the two rounds of briefing which are part of this proceeding. This should provide them ample opportunity to refute or explain any misrepresentation, misunderstanding or misapplication by the RPA or Staff of any of the data contained in the exhibits. Moreover, while no compelling reason to allow for additional live testimony has been presented, the evidentiary record is not formally closed until after reply briefs are filed. For the foregoing reasons, all parties will be able to test, rebut and refute any assertions made regarding any document in evidence. More is not required to ensure fundamental fairness and due process in this proceeding.

Moreover, I find that no basis for extending the briefing schedule, as requested by the RPA and opposed by the petitioners, has been put forward. There is no doubt that petitioners have endeavored to resolve these disputes in good faith as quickly as possible. Therefore, absent the consent of all parties, the briefing schedule will not be amended at this time.

Accordingly, consistent with the foregoing, I hereby **ORDER** that, in addition to the exhibits already entered into evidence at the hearing, the following documents are admitted into the record (with evidence number markings in parentheses):

Binder 5, No. 228136-183 (RPA-4)  
Binder 6, No. 450398-435 (RPA-5)  
Binder 6, No. 451924-948 (RPA-6)  
Binder 6, No. 451949, 452029-94 (RPA-7)  
Binder 6, No. 452846-877 (RPA-8)  
Binder 6, No. 452878-909 (RPA-9)



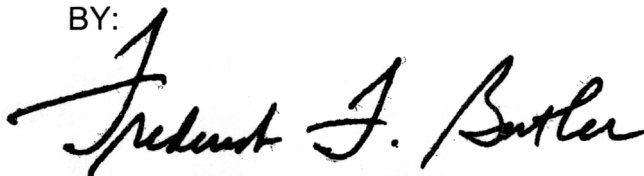
Binder 6, No. 452913-924 (RPA-10)  
Binder 6, No. 452925-937 (RPA-11)  
Binder 6, No. 452938-976 (RPA-12)  
Binder 6, No. 449288-327 (RPA-13)  
Binder 6, No. 449328-367 (RPA-14)  
Binder 6, No. 452843-845 (RPA-15)  
Binder 6, No. 452910-912 (RPA-16)  
Binder 6, No. 452977-453016 (RPA-17)  
Binder 6, No. 452138-180 (RPA-18)  
Binder 7, No. 452213-45579 (RPA-19)  
Binder 9, No. 422577-586 (RPA-20)  
Binder 9, No. 422588-600 (RPA-21)  
Binder 9, No. 422691-703 (RPA-22)  
Binder 9, No. 420875-988 (RPA-23)  
Binder 9, No. 423855-876 (RPA-24)  
Binder 9, No. 423917-929 (RPA-25)  
Binder 10, Joint Opp. of SBC and Ameritech to Deny and Reply to Comments  
(11/16/98, cc docket no. 98-141), Reply Affidavit of James Kahan date 11/13/98 and  
Attachments (RPA-26)  
Transcript Request Responses, Joint Petitioners (RPA-27)  
Joint Petitioners Response to Data Request RPA-104 (Staff-1)  
Joint Petitioners Response to Data Request Staff-3 (Staff-2)

This provisional ruling is subject to ratification or other alteration by the Board as it  
deems appropriate during the proceedings in this matter.

DATED:

06/30/05

BY:

A handwritten signature in black ink, appearing to read "Frederick F. Butler". The signature is written in a cursive, flowing style with a large initial 'F'.

FREDERICK F. BUTLER  
COMMISSIONER

**AT&T/SBC MERGER SERVICE LIST**

**DOCKET NO. TM05020168**

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